153 U. S. 391. That the peculiar hazard of railroad employment is deemed sufficient a basis for discrimination is well settled; and the fellow-servant rule may be modified or entirely abrogated in the case of such employment. *Mo. Pac. R. R. Co.* v. *Mackey* (1888) 127 U. S. 205. But on the other hand a statute was held unconstitutional which allowed the recovery of attorney's fees if suit was brought because of the railroad company's refusal to pay a claim; the court holding that in this respect railroad companies did not constitute a class to justify such discrimination. *G. C. & S. Fe R. R. Co.* v. *Ellis*, supra.

The right of a state to enact laws of the character in question is derived from the police power. Cooley, Const. Lim., 7th ed., 869. Derived from the interests of the public in the business to be effected, an exercise of that power can only be justified by the demand of those interests. *A. T. & S. Fe* v. *Matthews* (1898) 174 U. S. 96. And so in the last named case a statute was held constitutional which allowed for the recovery of attorney's fees in actions against railroad companies for damage caused by fire in the operation of the road, the effect of the act being to compel the road to increase precautions to prevent fires. It would seem therefore that a statute which had the effect of compelling a high degree of care in the selection of employees had an equally sufficient reason for its enactment.

But the effect of the Ohio statute is twofold; it not only discriminates against railroads, as discussed above, but further it classifies the employees of railroads and discriminates against those in authority. If the right which permits of legislative discrimination against a class arises in the public interest, it would seem that the duty to the public and the burden of the discrimination should be correlative. The duty must be owing from the one on whom the burden falls; for no right exists against one who owes no duty. The purpose of the present statute, or its effect, is not to exact a duty from the employees in authority; the discrimination against them cannot be justified because the effect of the statute is to exact by indirection a duty from the employer. If any duty is owing from the employer it is to exercise care in the selection of all employees, and this duty can be exacted without discrimination against the employees. The rule was laid down in *G. C. & S. Fe R. R. Co.* v. *Ellis*, supra, that the classification must rest upon a difference which bears some relation to the act in respect to which the classification is proposed. The classification proposed by the Ohio statute is in respect to employment in the railroad business; and the difference upon which it rests is authority in that employment. Were the authority in the business general, the necessary relation between it and the employment would exist; but authority in one branch and employment in another may be wholly unrelated. It would seem therefore that there were several valid objections to the constitutionality of the statute which the court had overlooked.

LIABILITY OF A MILITARY GOVERNOR IN TORT.—A question involving the tort liability of a military governor for an illegal act done in his official capacity was presented in a recent decision of the federal court for the Southern District of New York. The plaintiff, who was

possessed of an hereditary and alienable office known as the Alguacil Mayor of Havana, carrying with it an exclusive franchise to slaughter cattle in Havana, brought suit against the military governor of Cuba for damages suffered by reason of his order abolishing this office. On demurrer to the complaint, the court held that this franchise was private property and within the pledge given in the President's proclamation of July 13, 1898, and later by the Treaty of Paris. *Countess of Buena Vista* v. *Maj. Gen. Brooke* (1905) 32 N. Y. Law J. 1903.

Under the rule that the will of the conqueror constitutes the law of the conquered, a military governor has been held exempt from personal liability for acts done in violation of private property rights. *Elphinstone* v. *Bedruchund* (1830) 1 Knapp 316; *Dow* v. *Johnson* (1879) 100 U. S. 158. But the decided tendency in this country is to limit the power of a military commander who seizes the property of a citizen of the United States, even in time of war, to the strict requirements of the exigency. Orders given in violation of an officer's limitations are absolutely void. *Planters' Bank* v. *Union Bank* (1872) 16 Wall. 483; *Raymond* v. *Thomas* (1875) 91 U. S. 712. And the officer is liable in tort for damages suffered by a citizen in consequence. *Mitchell* v. *Harmony* (1851) 13 How. 115. It would follow from this that when the military government ceases to be an instrument to promote actual warfare and devotes itself instead to civil administration, greater limitations attach. There would therefore seem to be good authority for holding the present defendant liable in tort when it is shown that his order violated property rights of the plaintiff which were within the protection guaranteed to the citizens of Cuba by the United States.

The office of alguacil mayor was terminated when the sovereignty of Spain in the island was superseded by that of the United States. But the franchise as a property right had been separated from the office by an edict of the Governor General in 1878. As such it constituted a monopoly under the common law, and which would be constitutional in this country only under an exercise of the police power. *The Slaughter House Cases* (1872) 16 Wall. 36. But by the Treaty of Paris and the President's Proclamation of July 13th, 1898, the private law of the island was to continue in force. Under the Spanish Civil Code, Art. 336, the franchise in question was a legitimate form of private property, and under Art. 349, indestructible without compensation. There seems to be no question that the franchise was within the contemplation of the treaty and that the defendant was properly held liable.

UNAUTHORIZED OPERATIONS BY SURGEONS.—A recent case in Illinois is of marked interest, both professional and lay. The plaintiff had been suffering from epilepsy and went to consult the defendant, a surgeon. He found that a major and a minor operation were desirable, but informed the patient of the necessity of only the minor one. She consented to that; it was performed, and she left the hospital. She later returned to have this minor operation repeated. During her first stay at the hospital the surgeon found her in a highly nervous and irritable condition which he described as insane, and on her return he considered her judgment so unbalanced that she could not